

Supreme Court No. 126036

Court of Appeals No. 240790

Lower Court Case No. 00-724-CZ

STATE OF MICHIGAN
IN THE SUPREME COURT

BLACKHAWK DEVELOPMENT CORPORATION,
A Michigan corporation, DEXTER CROSSING, LLC,
A Michigan limited liability company

Plaintiffs/Appellant

vs.

VILLAGE OF DEXTER and DEXTER DEVELOPMENT,

Defendants/Appellee

SUPPLEMENTAL BRIEF IN SUPPORT OF
APPLICATION FOR LEAVE TO APPEAL

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Plaintiffs/Appellants file this Supplemental Brief pursuant to this Court's Order dated October 28, 2004. Plaintiffs rely on and incorporate herein their Application for Leave to Appeal and Reply Brief in Support of Application for Leave to Appeal previously filed in this proceeding.

The courts below erred in reading more into the express easement than the words of the easement allow. Defendants have referred to Plaintiff's assignment of error on this point as an "overly literal" application of the words used in the easement. See Defendants' Brief in Opposition to Application for Leave to Appeal at 10. Defendants' argument is simply an acknowledgement that the text of the easement itself does not support the lower courts' decisions. Indeed, Michigan law unequivocally requires this "overly literal" application of the words of the easement: "The use of an easement must be confined strictly to the purposes for which it was granted or reserved." *Delaney v Pond*, 350 Mich 685, 687, 86 NW2d 816 (1957); See also cases cited at 14-16 in Plaintiffs' Application for Leave.

The dissenting opinion of Judge Smolenski in this case succinctly summarizes the error below:

Improving Dan Hoey Road cannot be read to mean that the Village had the right to authorize the building of access roads, sidewalks, landscaping, lighting or the running of public utilities across land being unused by the Village for the sole purpose of developing the Dexter Commerce Center, *a private development*.

If the use of the easement is confined to the purposes for which it was granted, there is not question that the construction on plaintiff's property was improper. I believe that it is disingenuous for defendants to argue that the construction that has occurred is within the scope of the easement because they are necessary for the same reason Dan Hoey Road needed to be realigned, public safety and welfare. But defendants fail to recognize a key point. None of the measures taken by defendants, even if required by the Village, would have been necessary for *any* reason were it not for the development of the Dexter Commerce Center. Standing alone, the access roads and utilities were not needed to improve Dan Hoey Road.

Exhibit A to Application for Leave to Appeal, Slip Op Dissent at 1-2. (Emphasis in original)

Plaintiffs cited in their Application the decisions in *Novi v Adell Trust*, 253 Mich App 330, 659 NW2d 615 (2003) and *Township of West Orange v 769 Associates*, 341 N.J. Super. 580, 775 A2d 657 (2001). This Court has granted the application for leave in *Novi v Adell Trust*, ___ Mich ___, 687 NW2d 297 (2004). Moreover, the appellate decision in *Township of West Orange* was reversed by the New Jersey Supreme Court. 172 NJ 564, 800 A2d 86 (2002). Impacting on the relevance of both these decisions is this Court's decision in *Wayne County v Hathcock*, 471 Mich 445, 684 NW2d 765 (2004), which reversed the decision in *Poletown Neighborhood Council v Detroit*, 410 Mich 616, 304 NW2d 455 (1981).¹

This Court's decision in *Hathcock*, like the previous decision in *Tolksdorf v Griffith*, 464 Mich 1, 626 NW2d 163 (2001), further underscores the notion that the government may not utilize its powers to the benefit of one private developer to the detriment of another private landowner. See also *Shizaz v City of Detroit*, 334 Mich 44, 50, 52 NW2d 589 (1952):

[W]hile the courts have not been in agreement on the precise meaning of the term 'public use,' it has been held, without a single dissenting voice, that the state does not have power to authorize the taking of the property of an individual without his consent for the private use of another, even on the payment of full compensation.

In his dissent, Judge Smolenski found that the "facts presented in this case are akin to a taking because the actions approved by the Village were not authorized by the easement." Exhibit A to Application for Leave, slip op. dissent at 2, n1. Indeed, the facts unequivocally demonstrate that the improvements sought to be constructed by Defendant Kingsley have no public origin and only benefit his private development. See Application for Leave at 25-28; See also Dissent: "I

¹ The appellate decisions in *Adell Trust* and *West Orange* relied upon the *Poletown* "heightened scrutiny" standard. The New Jersey Supreme Court ruled that the *Poletown* standard had never been adopted in New Jersey and instead that the government's exercise of power was only limited by a "manifest abuse of discretion" standard. 172 NJ at 577-78.

believe it is clear that the private purposes predominate over any public benefit, and in fact were the sole driving force behind the purported “improvements.” Exhibit A to Application for Leave, slip op. dissent at 2.

There is no substantive difference between that which Mr. Kingsley seeks to accomplish on Mr. Bonar’s land from that which Mr. Tolksdorf sought to accomplish on his neighbors’ land in *Tolksdorf*. Mr. Kingsley attempts to bootstrap his way onto his neighbor’s property by way of an express easement, while Mr. Tolksdorf sought to do the same by way of the Private Roads Act.² Either way is impermissible:

[The Act] gives one party an interest in land the party could not otherwise obtain. By eliminating the landowner's right to exclude others from his property, the act conveys an interest in private property from one private owner to another.


464 Mich at 10. Defendants accomplish the same simply by way of easement interpretation.

For the reasons stated herein and in Plaintiffs Application for Leave to Appeal and Supplemental Brief in Support of Application for Leave to Appeal, Plaintiffs request that this Court grant leave to appeal or, in the alternative, reverse the court of appeals based on the reasoning and conclusions of the dissent, grant summary disposition in favor of Plaintiffs on the scope of the easement pursuant to MCR 2.116(I)(2), and remand to allow Plaintiffs to pursue their claims for injunction and damages.

² There are of course factual differences. Mr. Tolksdorf sought the government’s help in building one driveway and utilities across his neighbor’s land, while Mr. Kingsley seeks to build two driveways, sidewalks, lighting, utilities and landscaping on Mr. Bonar’s property. Mr. Tolksdorf had no other means to access and develop his property. The court of appeals found here, and the evidence is undisputed, that Kingsley’s development could proceed with access only to Dexter-Ann Arbor Road. See Exhibit A to Application, Slip Op at 3; see also Application for Leave at 7-8, 26. Thus, unlike Mr. Tolksdorf’s landlocked property, access over the Blackhawk parcel is unnecessary to Mr. Kingsley’s development.

Respectfully submitted,

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